NOTICE TO THE BAR

REQUESTING COMMENTS ON RECOMMENDATIONS RELATING TO RETAINER FEE AGREEMENTS IN STATUTORY FEE-SHIFTING CASES

The New Jersey Supreme Court requested the Advisory Committee on Professional Ethics ("Committee") for recommendations on the ethics issues relating to retainer fee agreements in statutorily based discrimination cases in furtherance of the Court's decision in Balducci v. Cige, 240 N.J. 574 (2020). In Balducci, the Court noted that the facts of the case raised questions about the necessity for new rules of general applicability concerning the reasonableness of fees in statutorily based discrimination cases. Among the materials that the Committee reviewed were comments from members of a preliminary ad hoc committee.

The Committee made these recommendations:

1. Explicit Disclosure of Identifiable Fees or Costs That Clients Must Pay; Oral Review of Such Provisions

The Committee recommends that lawyers must explicitly disclose, in the retainer agreement, all identifiable fees or costs that the client may have to pay up-front or at the conclusion of the case. The retainer agreement must be written in plain language, so that the least sophisticated clients – and especially lower-income clients – will know their obligations and potential liability at the beginning of the representation and have a clear understanding of such fees or costs.

In addition to presenting the client with the written retainer agreement, the Committee recommends that a lawyer must orally review and highlight those provisions in a retainer agreement that require the client to pay costs or fees personally. The thoroughness of this oral review will vary, depending on the lawyers' assessment of their clients' level of comprehension of the agreement.

This recommendation draws on the existing, baseline ethical obligations set forth in Rules of Professional Conduct 1.4(c) and 1.5(b) and case law. The Court in Balducci held that the lawyer must explain charges and costs, beyond the hourly rate, 240 N.J. at 592, and disclose charges for identifiable costs at the beginning of the representation, id. at 604. See also Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 531 (App. Div. 2009), certif. den. 203 N.J. 93 (2010) (Rule of Professional Conduct 1.4(c) requires "[f]ull and complete disclosure of all charges which may be imposed on the client"); K. Michels, New Jersey Attorney Ethics, Section 33:4, page 842 (Gann 2021) ("The written statement required by RPC 1.5(b) must disclose all charges for which the client will be financially responsible").

While acknowledging the current practice in many law firms that lawyers do not orally discuss the retainer agreement with clients, but rather present the written agreement to the client and provide time for the client to read it and ask any questions, the Committee notes that a contract for legal services is not like other contracts and that lawyers must satisfy their fiduciary obligations to the client when presenting a retainer agreement. Balducci, 240 N.J. at 592; Cohen v. Radio-Electronics Officers Union, 146 N.J. 140, 155-56 (1996). The Committee concludes that the practice of only presenting a written retainer to the client without any oral review of the

provisions governing the client's personal liability for fees and costs does not adequately satisfy the lawyer's fiduciary obligations and thus recommends that such oral review of those provisions regarding the client's personal liability for fees and costs must take place.

This recommendation was not unanimous. Noting the power and knowledge disparity between lawyers and clients, several Committee members were in favor of a requirement that the lawyer must orally review all provisions of the fee agreement with the client, even in cases in which the client is not obligated to pay costs or fees personally.

2. Estimated Fees and Costs and Range of Value of Case Set Forth at the Initiation of Representation

The Committee recommends that lawyers must provide clients with an estimate of fees and costs and the range of value of the case at the initiation of the representation. Lawyers have "an obligation to provide the client with meaningful information about the potential aggregate hourly fees and costs that may be incurred during the course of the litigation so that the client may make an intelligent assessment whether to retain the attorney and on what terms." Balducci, 240 N.J. at 603. The lawyer should explain, either in the written retainer agreement or orally, the range of the value of the case and the factors that could escalate fees, such as extended discovery, numerous depositions, voluminous document review, settlement, or trial. Id. at 602-03. While lawyers cannot estimate the value of the case or the amount of fees "with precision" at that stage of the representation, they must still give "meaningful guidance" to the clients at the beginning of the case, based on their general experience. Id. at 603.

This obligation would exist even when fees and costs are anticipated to be paid by the adverse party and not by the client in a fee-shifting case. The information is important since fees and costs may invade, or even exceed, the client's recovery. The Committee is aware that fees and costs in some fee-shifting cases can be astronomical and that lawyers may feel that if their clients were aware of the potential amount of costs, they would not hire a lawyer for their case. The lawyer, however, has a much greater knowledge base than most clients and bears the burden of sharing that knowledge and informing their clients. Balducci, supra, 240 N.J. at 603 (lawyer's obligation to provide the client with "meaningful information"); Cohen, supra, 146 N.J. at 156 (quoting Restatement of The Law Governing Lawyers, § 29A, comment h, (1996)) ("lawyers have a fiduciary obligation to inform clients about the risks of the representation, including those unresolved by the client-lawyer agreement"). The Committee agrees with the Court that the obligation to disclose this level of information is required by Rules of Professional Conduct 1.4(c) (duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation") and 1.5(a) (the lawyer's fee "shall be reasonable").

3. Continuing Obligation to Inform Clients About Rising Fees and Costs

The Committee recommends that lawyers have a continuing obligation to inform clients about additional fees and costs that may arise as the case progresses. Lawyers should be mindful of what the fees and costs are and what they may become and should communicate this information to the client on an ongoing basis. See Rule of Professional Conduct 1.4(c)

(duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

4. Obligation to Notify Client That Fees and Costs Are Likely to Invade Client's Recovery; When Fees and Costs Are Likely to Exceed Client's Recovery, Client Must Give Informed Consent on Whether to Continue Litigation

Lawyers must promptly inform the client when the lawyer realizes that fees and costs have grown beyond what the lawyer previously anticipated they would be and are likely to invade or exceed the client's recovery. See Balducci, supra, 240 N.J. at 602; Chestone v. Chestone, 322 N.J. Super. 250, 259 (App. Div. 1999) ("[w]hen an attorney sees that protracted litigation will be economically unfeasible due to the issues or amount in dispute and can reasonably foresee that anticipated counsel fees are disproportionate to the amount in dispute, or exceed it, the attorney is obliged to communicate that fact to the client"); Michels, supra, Section 33:1, page 821 ("When an attorney can foresee that the cost of the litigation will approach or exceed the client's recovery, RPC 1.4(c) requires discussion of this concern with the client").

When a lawyer becomes aware that fees and costs are likely to exceed the client's recovery, and the suit is for damages only, the lawyer has an obligation to have a frank discussion with the client about whether the client wants to continue the litigation. At this point in time, the client has nothing to gain, financially, from continuing the suit; only the lawyer has the incentive to proceed. Clients in this position may become disinterested in the litigation, which presents problems for the lawyer who may still need the client to appear for depositions, provide information in response to

discovery, or participate in other ways. The Committee recognizes that clients who stand to gain nothing may still want to continue, to punish the defendant or to assist the lawyer to recover monies for the legal services rendered. The Committee recommends that the lawyer must obtain informed consent from the client to continue the litigation at the point in time when the lawyer reasonably believes that fees and costs are likely to exceed the client's recovery.

5. A Contingency Fee Agreement When There is No Risk of Nonpayment of Fee is Presumptively Unreasonable

The Committee recommends that a contingency fee agreement when there is no risk of nonpayment of fee because the client must pay the lawyer regular hourly rate fees or a high retainer even if there is no recovery, should be presumptively unreasonable. This type of agreement, in which there is no risk to the lawyer of nonpayment of a regular fee, was the agreement at issue in the Balducci case (a fee that is the greater of the lawyer's regular hourly rate; or a contingency fee of 37.5 percent of the total recovery (damages and fee award combined); or the statutory fee award; with the hourly rate payable even if there is no recovery). As the Court stated in Balducci, supra, 240 N.J. at 598, "the element of uncertainty of recovery is often important in determining whether a contingent fee as ultimately charged is reasonable or excessive," quoting In re Reisdorf, 80 N.J. 319, 329 (1979); and at page 600, again quoting Reisdorf, "if the risk of nonpayment to a lawyer is small or nonexistent, resort to a contingent arrangement with its potential for a much larger fee, can be unfair and inequitable to the client."

The Committee notes, however, that hybrid fee arrangements, where the lawyer charges a reduced hourly rate or reduced initial retainer, payable

even if there is no recovery, but then receives a modest bonus on a favorable recovery, is permissible. See, e.g., Rendine v. Pantzer, 141 N.J. 292 (1995) (LAD case, lawyer charged the greater of 50 percent of regular hourly billing rates plus 25 percent of recovery, or the court-awarded lawyer fee).

6. A Contingency Fee on Combined Damages and Fee Award Is Not Presumptively Unreasonable

The Committee recommends that a contingency fee agreement in which the damages award and the fee award are combined, and a percentage is applied to the combined amount, should not be presumptively unreasonable. See Cambridge Trust Co. v. Hanify & King Professional Corp., 721 N.E.2d 1, 6-7 (Mass. 1999) (contingent fee based on aggregate of award of damages plus the lawyer fee award permissible if expressly stated in the retainer agreement). See also Venegas v. Mitchell, 495 U.S. 82, 89-90 (1990) (lawyer fee award in § 1988 case belongs to the client, not the lawyer).

7. A Retainer Agreement May Not Prohibit Client from Settling Case When Settlement Waives Lawyer's Fee Award

The Committee recommends that a lawyer in a retainer agreement may not prohibit the client from consenting to settle a case when the settlement waives the lawyer's fee award. Pursuant to Rule of Professional Conduct 1.2(a), a lawyer "shall abide by a client's decision whether to settle a matter." A provision requiring the client to not settle a case when the offer does not include lawyers' fees violates this Rule. Therefore, lawyers may not include in the retainer agreement a provision that forecloses the client from deciding to settle a matter when the terms of the settlement waive the lawyers' fees or costs; private lawyers may protect themselves by including

alternative fee arrangements in the retainer agreement that require the client to pay reasonable legal fees.

The Committee acknowledges that settlement negotiations in fee-shifting cases present counsel with an ethical dilemma. Defendants may not demand fee waivers as a condition of settlement in fee-shifting cases involving public interest law firms, though such demands may be presented to plaintiffs represented by lawyers in private practice. Pinto v. Spectrum Chemical and Laboratory Products, 200 N.J. 580, 599-600 (2010). Private lawyers may protect themselves by including alternative fee arrangements in the retainer agreement that require the client to pay reasonable legal fees.

8. There Should Not Be a Cap on Fees Recoverable in Statutory Fee-Shifting Cases, But Lawyers Must Place in the Retainer Agreement When the Fee Percentage Is Higher than 33⅓ Percent

The Committee recommends that the exclusion in Rule 1:21-7(c) should not apply to cap fees recoverable in statutory fee-shifting cases or to require lawyers to seek court approval of fees in excess of a stated percentage (customarily 33⅓ percent). While higher fees invade the client's recovery, a majority of the Committee finds that lawyers who handle statutory fee-shifting cases should be well-compensated, as such cases often uphold important statutory rights. The Committee notes that fee awards, or the portion of fees in a settlement offer, are often low, and it may be necessary to charge higher (though still reasonable) fees to provide an incentive to take such cases.

The Committee was not unanimous on this issue. A minority of the Committee notes that the lawyer who seeks higher fees asks the client to agree to this at the initiation of representation. There is a power and

knowledge disparity between the lawyer and the client, and a client is unlikely to know that a fee percentage that is more than 33⅓ percent may not be standard. These members observe that public policy favors enhancing the client's recovery, not the lawyer's fee.

While the Committee finds that fees in statutory fee-shifting cases should not be capped, the majority of the Committee recommends that lawyers who charge fees that are above 33⅓ percent be obligated to inform clients, either in the retainer agreement or orally, that their fees are higher than the presumptive percentage of the recovery amount. As the minority noted and the Committee acknowledges, there is a power and knowledge disparity between lawyers and clients. The fee is set by the lawyer and agreed to by the client at the initiation of representation. Clients are unlikely to know what the standard fee percentage is or whether their lawyer is proposing a fee percentage that is greater than that amount. If lawyers have decided to charge a higher fee, they should notify their clients.

9. Proportionality Between Fee Award and Damages Award

The Committee considered whether there should be proportionality between the fee award and the damages award. It recommends that there need not be proportionality.

Many fee-shifting cases focus on a remedy that upholds an important principle rather than the payment of a monetary award. Such cases, when successful, often result in a low damages award and a high lawyer fee award. The Legislature intended this result when it provided for the payment of lawyer fees to the prevailing party. See Szczpanski v. Newcomb Medical Center, 141 N.J. 346, 365-66 (1995) (fee-shifting provisions were "intended to assure that counsel for litigants like plaintiff will receive reasonable

compensation for services reasonably rendered to effectuate the [Law Against Discrimination's] objectives"). Even when the result in a fee-shifting case furthers more of a private interest than a public interest, the overarching purpose of the case – to uphold a plaintiff's rights – serves the public interest and the statutory purpose to protect important civil, statutory, and constitutional rights. Id. at 366. The Committee concluded that lawyers should continue to have an incentive to represent clients in this type of case. The Committee further expressed concerns about access to justice if there were a proportionality requirement that restricted lawyer fees.

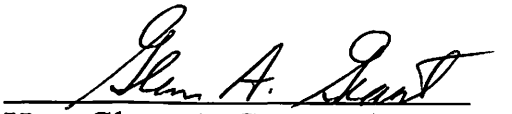
Comments Requested

The Court requests comments on the Committee's recommendations. Comments should be submitted by January 5, 2022 to:

Hon. Glenn A. Grant
Acting Administrative Director of the Courts
Attention: Retainer Fee Agreements in Fee-Shifting Cases
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Comments may also be submitted by e-mail to the following address: Comments.Mailbox@njcourts.gov.

The Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address and those submitting comments by e-mail should include their name and e-mail address. Comments submitted in response to this notice are subject to public disclosure.



Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: November 19, 2021